APPEAL NO. 93029

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on December 11, 1992, in (City), Texas, before hearing officer (hearing officer). The issues presented were whether the claimant was injured in the course and scope of his employment on (date of injury) and, if so, whether he had disability as defined by the 1989 Act. The carrier, who is the appellant in this action, has requested this panel's review of the hearing officer's decision and order in favor of the claimant, contending that the hearing officer erred as a matter of law in determining certain facts, including that the claimant injured his shoulder in the course and scope of his employment. No response was filed by the claimant.

DECISION

Upon review of the record in this case, we affirm the decision and order of the hearing officer.

The claimant was employed by (employer) on (date of injury). On that date he testified that he was cutting a pipe with a saw when the safety chain holding the pipe became unlatched. He said that he grabbed the pipe, which weighed approximately 250 pounds, with his right arm to keep it from falling, and that it rolled toward him onto his right arm and shoulder. He said employer's safety coordinator, (Mr. E), was standing nearby and observed what happened. Mr. E asked if he was all right and whether he needed to see a doctor. The claimant said he thought he was all right at the time, and because he is left-handed he was able to work the rest of that day and all the next day. The following Monday he was laid off by his supervisor, (Mr. J) because business was slow. Claimant did not mention the incident with the pipe to anyone that day, nor the day he came in to pick up his pay check, because he had already informed Mr. E, the safety coordinator, pursuant to employer's instructions at a prior safety meeting.

Claimant said he was taking nonprescription medication for shoulder pain, but when the pain got worse he attempted to call Mr. J about getting medical attention. When he finally got Mr. J on the telephone, claimant told him that Mr. E knew of the injury; however, he was told that Mr. E no longer worked for employer. Ty Gentry (Mr. G), employer's vice president, telephoned Mr. E to see if he had any recollection of claimant's injury. Both Mr. G and Mr. E testified at the hearing that Mr. E said at that time he thought claimant had hurt his shoulder while horseback riding on the weekend. Mr. E testified, however, that after he came to work for employer in May of 1991 claimant had been off work and Mr. E had been under the impression he had fallen off a horse. That incident, he said, was the first thing that occurred to him when Mr. G telephoned him. He said that a day or two later he recalled the incident with the pipe, and that he so informed Mr. G. Both Mr. G and Mr. E agreed that Mr. E had been terminated for poor work, and that their conversations about claimant occurred after the termination. Mr. E testified that he saw the pipe slip and fall against claimant's arm, as claimant described, but acknowledged

that he did not make a written report of claimant's injury nor convey the information to anyone despite the fact that as employer's "safety man" he was aware of company procedures with regard to injuries. Mr. G stated that he questioned whether Mr.E was trustworthy, which was one problem employer had with him. He disputed that Mr. E ever called him back to tell him he remembered claimant's alleged injury.

Mr. J, who is employer's field superintendent, said he first became aware of claimant's injury when claimant contacted him on July 21st. Mr. J believed the injury was not work-related because he said that two to three weeks before the incident the claimant said his shoulder was hurt as a result of handling horses. He said the claimant at that time brought in a doctor's excuse for missing work. Both claimant and his wife testified that they owned horses, but that the last time the claimant had ridden was the Easter weekend prior to the June injury.

On cross-examination the claimant stated that he had had two prior work-related injuries which he had reported to the "main office." He also said that when picking up his final check he did not sign employer's time card which asks whether an employee has been injured during the preceding pay period because he said he was not given the card to sign. Claimant also acknowledged that he applied for unemployment insurance the same day he picked up his last check; that on the unemployment application he stated he had been laid off because of no work; and that he had represented that he was able to work. He stated that when he filed for unemployment insurance he felt he was able to work; however, he has not been called for any job.

On July 22nd claimant saw Dr. A, who took x-rays and diagnosed a torn rotator cuff on the right shoulder. On July 27th Dr. Albarado referred claimant to Dr. G, who took claimant off work until further notice as of August 19th. Claimant testified that Dr. G told him he needed surgery, but that he was now receiving no medical treatment because he could not afford it.

In its request for review, the carrier contends the hearing officer erred in making the following findings of fact:

FINDINGS OF FACT

5.Claimant injured his shoulder on (date of injury), when a safety chain failed to hold on a saw he was operating, causing a heavy pipe to jump off the track.

6.[Mr. E], employer's safety man, was working near claimant and saw the incident leading to the injury on (date of injury).

7.Claimant did not immediately seek medical care because he did not think at first that the injury was serious.

8.Claimant's initial belief that the injury was not serious was reasonable under the circumstances.

The carrier basically contends that the evidence supporting the hearing officer's findings is conflicting, not credible, and not reliable and hence the claimant has failed to meet his burden of proof to establish that a compensable injury occurred.

When reviewing a fact finder's determination to ascertain the factual sufficiency of the evidence, this panel must consider all the evidence in the record and set aside the hearing officer's decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). In this case, the claimant's testimony regarding his injury was corroborated by Mr. E's later recollection, despite his earlier statement to employer. Evidence to the contrary included Mr. J's testimony that claimant had suffered a shoulder injury from a riding accident a short time earlier, which was denied by claimant. The carrier further notes claimant's continuing to work after the injury; his failure to notify his employer in the same manner as with earlier injuries; his application for unemployment benefits, which asserted he was ready and able to work; and Mr. E's unreliability as a witness.

The evidence highlighted in carrier's request for review bears directly on credibility of the witnesses, which is a matter clearly within the hearing officer's purview. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence, and of its weight and credibility. Article 8308-6.34(e). As trier of fact, the hearing officer may believe all, part, or none of any witness's testimony; judge credibility; assign weight; and resolve conflicts and inconsistencies in the evidence. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Where there is conflicting testimony, the hearing officer may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). We are not authorized to set aside the hearing officer's decision because different inferences and conclusions may have been drawn, even though the record contains evidence of, or even gives equal support to, inconsistent inferences. Garza v. Commercial Insurance Co. of Newark N.J., 506 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Upon our review of the record, we find no basis for disturbing the decision below. We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge